80-1022

No. .....

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1980

PASCO PETROLEUM CO., INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA and GEORGE W. HUBBARD, Audit Director, and ECONOMIC REGULATORY ADMINISTRATION, DEPARTMENT OF ENERGY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTION PRESENTED FOR REVIEW

Does a "Statement of Policy" that purports to limit the civil liability of petroleum marketers, and which was proposed, adopted, and published in accordance with the procedures for a substantive regulation, bind the Department of Energy?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The petitioner, Pasco Petroleum Company, Inc. ("Pasco" or "the Company"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States entered in this proceeding on October 16, 1980.

*Caption contains names of all parties.

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals has not been reported. It appears at Appendix A. The District Court for the District of Arizona entered its order without opinion. That order is at Appendix B. The decision and order of the Office of Hearings and Appeals of the Department of Energy are reported in [1979 Transfer Binder] Energy Management (3 D.O.E.) ¶ 82,507. They appear at Appendix C.

JURISDICTION

The Temporary Emergency Court of Appeals entered its judgment on October 16, 1980, and denied the petition of Pasco for rehearing en banc on November 17, 1980. Pasco files the present petition within thirty days of the latter date. This Court has jurisdiction under section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C.A. § 754 (West 1976), as it incorporates section 211 of the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note (West 1980).

PROVISION OF THE *FEDERAL REGISTER* INVOLVED

STATEMENT OF POLICY REGARDING AUDITS BEGUN AFTER JUNE 30, 1978, TO DETERMINE COMPLIANCE WITH THE MANDATORY PETROLEUM PRICE REGULATIONS

A. It is the policy of the Economic Regulatory Administration (ERA) not to commence any price regulation audits after June 30, 1978, at: (1) Any resellers, reseller-retailers or retailers (as defined in 10 CFR 212.31) of petroleum products other than pro-

pane, or (2) small resellers, small reseller-retailers or small retailers of propane, except on suspicion of a willful violation of the price regulations, by reason of complaints or other credible indications of significant violations, or if an exception or other special relief from the price regulations has been afforded. Resellers, reseller-retailers or retailers (as defined in 10 CFR 212.31) of propane are considered to be small if they had less than $2 million in sales of propane during calendar year 1977.

B. It is the policy of the ERA not to seek, as a result of price regulation audits commencing after June 30, 1978, to impose civil liability on: (1) Any firm described in paragraph A for transactions that occurred more than two years prior to commencement of the audit; or (2) Any other firm, except crude oil producers, crude oil resellers, and refiners in their crude oil production, sale and resale activities, for transactions that occurred more than five years prior to commencement of the audit, except where a firm has been convicted criminally for transactions covered by price regulations.

43 Fed. Reg. 27,777, 27,782 (1978).

STATEMENT OF CASE

This action arose as a suit to enforce an administrative subpoena that a regional office of the Economic Regulatory Administration ("ERA"), Department of Energy ("DOE" or "the Department"), issued on August 22, 1978, to Pasco, a reseller-retailer of gasoline. DOE issued the subpoena in connection with a proposed price control audit pursuant to regulations the Department has promulgated under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C.A. §§ 751-760 (West 1976 & Supp. 1980) ("EPAA").

Pasco contested the validity, scope, and enforceability of the subpoena before the Department, exhausting the administrative remedies that DOE then provided in 10 C.F.R. Section 205.8(h). *See* 41 Fed. Reg. 55,322, 55,323 (1976). When Pasco continued to contest the subpoena, DOE filed a petition for enforcement in the United States District Court for the District of Arizona. The Department invoked the district court's jurisdiction under section 5(a)(1) of the EPAA, 15 U.S.C.A. § 754 (West 1976), as it incorporates sections 206 and 211 of the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note (West 1980). DOE also relied on section 13(e)(2) of the Federal Energy Administration Act of 1974, 15 U.S.C.A. § 772 (West 1976), and on section 502 of the Department of Energy Organization Act, 42 U.S.C.A. § 7192 (West Supp. 1980). The parties submitted the matter by stipulation on exhibits and the depositions of government witnesses George Hubbard and Thomas Binns; there was no testimony in the district court. On May 20, 1980, that court entered an order, without opinion, that required Pasco to make its books and records available to the Department for inspection and audit. *See* Appendix B.

Pasco appealed the district court's order to the Temporary Emergency Court of Appeals ("TECA"), which entered its opinion and order affirming the district court. *See* Appendices A & D. Following TECA's denial of the Company's petition for rehearing, Pasco petitions this Court for a writ of certiorari.

Pasco contests the subpoena because it believes that an official audit limitation policy of DOE, pp. 2, 3, *supra*, precludes the audit for which the Department issued its process. This policy had its origins in late 1977 when pressure from Congress and the public made DOE aware that it had to afford petroleum marketers some certainty with regard to their liability for audits under its price

regulation program. On December 29, 1977, the Department issued a notice of proposed rulemaking that dealt with record retention requirements and limitations on audits. The notice included the following:

> We also recognize that a limitation on the length of time a firm must maintain records will, in substance, limit the time within which an audit can be undertaken of the matters covered by those records. However, to avail itself of this immunity from audit a firm might need to destroy records it would otherwise maintain. Therefore, we expressly request comment from the public as to whether, in addition to the recordkeeping requirements proposed here, ERA should institute a separate rulemaking to consider the adoption of regulations that would specify time periods within which ERA audits must be begun.

42 Fed. Reg. 64,902, 64,903 (1977).

Subsequently, on June 23, 1978, DOE adopted a final recordkeeping rule. At the same time and in the same notice, it adopted a "Statement of Policy" to limit audits and civil liability of marketers, apparently in lieu of the formal rulemaking it had earlier proposed. *See* 43 Fed. Reg. 27,777, 27,777-82 (1978). It is on that "Statement of Policy" that Pasco relies.

On June 27, 1978, the Office of Enforcement Policy & Planning of ERA issued the following memorandum to the then Acting Director of Enforcement for DOE's Region IX:

> The ruling on recordkeeping requirements will be issued during the week of June 26-30, 1978. It will have a July 1, 1978, issue date, which will preclude us from doing audits beyond two years unless they are started prior to July 1, 1978. This means the em-

> bargo period cannot be audited if the audits are not opened by June 30, 1978.
>
> . . . .
>
> DATS letters must be issued to these companies prior to July 1, 1978. Please prepare and issue the DATS letters to the firms listed below by COB June 27, 1978. . . .
>
> Pasco

Memorandum from B. Wagman, Director, to J. Wood, Acting Director of Enforcement, ERA, Region IX.

The Federal Energy Administration ("FEA"), DOE's predecessor, had once before, in August 1974, conducted a complete price control and allocation audit of Pasco for the period between January 1 and July 31, 1974. Now, on June 27, 1978, George W. Hubbard, Area Manager of ERA's Enforcement Division, prepared and mailed a data statement ("DATS") letter to Pasco to announce an audit for the "embargo period" only, November 1, 1973, to April 30, 1974. *See* Appendix G. Pasco received the DATS letter by mail on June 29, 1978. However, no auditor appeared at the Company's offices, or otherwise attempted or requested to begin an actual audit, until after July 1, 1978. Some time after that date, Thomas Binns, a DOE auditor, first requested records for May 15, 1973—to which a DOE ruling entitled him—and for the embargo period. Pasco offered Binns the May 15, 1973, records. However, the Company denied the embargo period records on counsel's advice that the attempted reaudit was unlawful and unauthorized under the new audit limitation policy.

Hubbard then advised Pasco that, unless the Company immediately made available the embargo period records, he would seek instead information to cover the entire EPAA price control period from April, 1973, to the then current

date. When, for the same reasons, Pasco again did not produce the embargo records, Hubbard issued a subpoena for essentially all of Pasco's records—over 36,000 documents—for the sixty-two month period between April 1, 1973, and June 30, 1978. *See* Appendix F.

The audit for which DOE issued that subpoena brings Pasco to this Court.

ARGUMENT

The Opinion of the Temporary Emergency Court of Appeals Conflicts With the Decisions of This Court

Though this case arises as a proceeding to enforce an administrative subpoena, the issue that brings Pasco to this Court is not the subpoena power. Instead, Pasco questions the civil audit for which the subpoena is but a means of access. Pasco contended below that the limitation policy barred the examination of records from most, if not all, of the period the subpoena specified. TECA, in deciding otherwise, effectively held that a regulatory agency can freely disregard its own "policy," even when that "policy" grants substantive rights to the regulated. This was wrong.

A. The Opinion of TECA

Pasco argued throughout both the administrative and judicial proceedings below that, though DOE's DATS letter may have begun an audit prior to the effective date of the limitation policy, that letter, by its express terms, commenced an audit for only the period that the letter specified. An examination that started after the limitation policy took effect, Pasco urged, had to comply with the policy. The DATS letter did not include fifty-six months of the period for which the subpoena demanded records,

and the Department issued the subpoena after the effective date of the limitation policy. Hence, regardless of whether the policy covered the period in the DATS letter, it surely governed the additional term that the subpoena spanned.

TECA dealt with this issue in curious fashion. The court said that "[T]hat policy is simply a policy, not a regulation or rule." However, the court enforced the subpoena because "DOE had commenced the Pasco audit prior to the effective date of the DOE reseller audit policy," not because the "policy," as a policy, did not bind the Department. Appendix A at A6. By enforcing the subpoena for more than the six months in the DATS letter, the court refused to hold the Department to a position which the court's own language indicated should restrain the agency. Yet, according to the decisions of this Court, the implication of that language, and not TECA's holding, is correct. By the criteria this Court has developed, the audit limitation is not a mere policy but a substantive pronouncement that governs any examination of the records of a reseller-retailer that DOE attempts after the policy took effect.

B. The Conflict With the Decisions of This Court

Pasco has argued that the audit limitation is more than a simple policy because it grants resellers-retailers a substantive right: certainly as to the extent of potential civil liability. The policy confers this right by relieving petroleum marketers from new audits by the Department unless their activities come within an exception to the policy's restraints. Quite simply, the audit policy serves as an administrative statute of limitations for resellers-retailers that DOE regulates. The Department made clear this intent when it published the policy:

D. *Audit Policy*—1. *Liability Periods.* An additional consideration that bears upon a sound and fair enforcement policy is the desirability of not allowing the period of exposure to civil liability (i.e., civil penalties, refunds, price rollbacks) to continue indefinitely. The ERA notes that federal laws generally limit the period of potential criminal liability, e.g., 18 U.S.C. 3282 which provides for a five year limitation. There is, however, no commensurate federal statute limiting the period of potential civil liability. The ERA believes that it is appropriate as a matter or prosecutional discretion, to impose upon itself such a limitation as to certain categories of firms at which audits had not been initiated prior to July 1, 1978.

2. *Policy.* . . .

3. *Reasons for the Policy.* The ERA views this as striking a reasonable balance between two competing considerations—the enforcement of price regulations and the granting of certainty to firms as to the extent of their civil liability.

. . . .

. . . The ERA has expended significant efforts in auditing embargo period violations for resellers of petroleum products other than propane. Any future targeting of such audits will be based upon complaints or other credible indication of significant violations. All such future audits will cover current violations, not embargo period violations, and will impose civil liability for only the two year period prior to commencement of the audit. This policy relieves all of approximately 21,600 resellers of petroleum products from undergoing new audits commenced after June 30, 1978, except for the reasons already noted.

43 Fed. Reg. 27,777, 27,780 (1978).

This Court has long held that the name an agency gives to a pronouncement does not conclude a judicial determination on the effect of that undertaking. For example, in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1941), the Court rejected the argument of the Federal Communications Commission that regulations which the Commission had adopted in the exercise of its rulemaking power simply embodied statements of policy. The Commission had argued that a network could not attack the rules directly because the regulations addressed only the agency itself. They were " 'nothing more than the expression of the general policy we will follow in exercising our licensing power.' " 316 U.S. at 411 n.1. Reversing a judgment that had affirmed the FCC's motion to dismiss a challenge to the policy, the Court noted that "The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do, and has done which is decisive." *Id.* at 416. These regulations, adopted by rulemaking procedures, affected the rights of networks generally. Though the rules did not address a particular person or corporation nor guarantee the imposition of penalties, they set a legal standard that made them subject to judicial review. *Id.* at 416-18.

Because the related procedural requirements suggest an intent to safeguard individual rights, rulemaking presents perhaps the easiest of cases. Yet, *Columbia Broadcasting* illustrates the standard that has continued to distinguish substantive pronouncements of many sorts from real policy statements: whether the agency intended to affect the rights of those it regulates. If an agency has violated its own pronouncements and those have provided a substantive benefit, an exception, or a procedural safe-

guard—rather than simply governed internal procedures—the federal courts generally have not upheld the agency. Note, *Violations By Agencies of Their Own Regulations,* 87 Harv. L. Rev. 629, 629-30 (1974).

In *Morton v. Ruiz,* 415 U.S. 199 (1974) this Court dealt with the effect of a rule in the Bureau of Indian Affairs *Manual,* "solely an internal-operations brochure intended to cover policies that 'do not relate to the public.' " *Id.* at 235. Though the *Manual* required the Bureau to publish in the *Federal Register* its regulations that did affect the public, the agency had denied financial assistance to a needy Indian on the basis of an eligibility standard that appeared only in the *Manual.* Affirming the court of appeals, this Court refused to permit the Bureau to depart from its own standard for distinguishing between public and internal directives. In language often quoted since, the Court held that

> Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. *Service v. Dulles,* 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton,* 359 U.S. 535, 539-540 (1959).

415 U.S. at 235.

This year, the Fifth Circuit applied this same analysis in *Alamo Express, Inc. v. United States,* 613 F.2d 96 (5th Cir. 1980), which involved the Interstate Commerce Commission's "forty-year practice of giving existing carriers telephonic notice and an opportunity to comment on the need for additional service" along a route. *Id.* at 97. Relying on *Morton,* the circuit court concluded that the ICC could not grant a trucking company an "emergency temporary authority" to operate on the route without af-

fording competitors the "important procedural benefits" of the telephonic notice. *Id.* at 97-98. The court held that

> [T]he failure to observe the only established practice for notifying existing carriers substantially prejudiced them.
>
> We do not mean to suggest that the ICC was required to adopt the notification practice. But once it was established, the agency was bound to observe the procedure pursuant to a series of Supreme Court cases which stretch back as far as *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

Id. at 98.

The present action presents a more compelling example of a substantive agency pronouncement than either *Morton* or *Alamo Express.* DOE neither sequestered its "policy" in some internal handbook nor evolved it as a matter of informal practice. In fact, the Department adopted the limitation by the procedures of rulemaking, the administrative process which *Columbia Broadcasting* involved.

By notice in the *Federal Register,* DOE asked whether it "should institute a separate rulemaking to consider the adoption of regulations that would specify time periods within which ERA audits must be begun." 42 Fed. Reg. 64,902, 64,903 (1977). The Department held hearings; it received comments; and it considered criticisms from Congress. 43 Fed. Reg. 27,777, 27,777-81 (1978). DOE concluded that, for sound and fair enforcement, it should impose on itself a limitation of audits and potential civil liability. 43 Fed. Reg. 27,777, 27,780 (1978). Then, after adhering to the requirements for adoption of a rule or regulation, the Department took the final procedural step

of publishing the limitation in the *Federal Register*—with other regulations—and labeled the limitation a "policy."

TECA dealt with the Department's "policy" in a manner wholly opposed to the analysis this Court undertook in *Columbia Broadcasting, Morton,* and the lines of decisions those cases represent. In its brief treatment, the court said little more than that the "policy is simply a policy." Appendix A at A6. The court made no attempt to examine how the "policy" affected the rights of Pasco or of any others in the regulated class. Yet, the court pointed out in a footnote that DOE's own decisions have treated the policy inconsistently. *See* Appendix A at A6 n.6. In *Glenn Martin Heller,* [1979 Transfer Binder] Energy Management (4 D.O.E.) ¶ 83,018, the Department's Office of Hearings and Appeals, looking only to the label, accepted the "policy" as policy and refused to apply it to an enforcement action. *Id.* at pp. 86,243-44. However, in the final administrative review of the present action, the very same Office of Hearings and Appeals stated that "We agree with Pasco that if it could be shown that the Regional Office issued this subpoena in contravention of the new audit policy issued by the national office, it would raise a serious question as to the propriety of the subpoena's issuance." Appendix C at A15. The Office of Hearings and Appeals then proceeded to apply the limitation to the Pasco audit and to uphold the audit on the basis of the policy's special exceptions. Appendix C at A15. TECA never reached the matter of exceptions; it refused to apply the "policy" at all.[1]

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1. Despite the conclusion of the Office of Hearings and Appeals that Pasco came within the special exceptions to the limitation policy, TECA's failure to reach this issue leaves the matter unresolved as far as the law is concerned. A subpoena enforcement proceeding is a *de novo* matter, not a review of the ad-

(Continued on following page)

In light of TECA's recognition that "[T]here has been some confusion within DOE itself as to the exact status of the new reseller audit policy," Appendix A at A6, the court's approach was wholly inadequate. This Court's decisions required TECA to look beyond the label of the Department's "policy" to see if the pronouncement had in fact substantively affected those that DOE regulates. *See Morton,* 415 U.S. at 235; *Columbia Broadcasting,* 316 U.S. at 416-18. Certainly a limitation on liability afforded petroleum marketers a significant right. DOE adopted and published the "policy" pursuant to notice, comment, and public hearing. The "policy" set a standard for the agency to decide what marketers it should thereafter subject to civil audits. And the "policy" detailed the circumstances under which the Department could depart from that standard. Not surprisingly, DOE itself explained the "policy" as a grant of "certainty" and a source of relief from audits for "approximately 21,600 resellers of petroleum products." 43 Fed. Reg. 27,777, 27,780 (1978). These justifications comport closely with those that underlie most legislative limitations on legal actions:

> [O]ne of the purposes of the statute of limitations is to relieve a court system from dealing with 'stale' claims where the facts in dispute occurred long enough ago that evidence is either forgotten or manufactured. But the wide variety of statutory periods cannot be explained solely on the basis of stale evidence. There is no doubt another element, of a more 'substantive'

Footnote continued—

ministrative record. Equal Employment Opportunity Comm'n v. United States Fidelity & Guaranty Co., 414 F. Supp. 227, 232 (D. Md.), *aff'd mem.*, 538 F.2d 324 (4th Cir. 1976); *see* F.T.C. v. Carter, 464 F. Supp. 633, 638 (D.D.C. 1979).

> character, which might be described as a concern for the interests of the potential defendant.

Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 559 (2nd Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). That concern centers on "the protection of the defendant from protracted fear of litigation." *Id.* at 559 n.13. What words could better summarize DOE's explanation for the limitation that the Department would now deny Pasco?

Yet TECA's analysis ignores the interests of Pasco in the Department's limitation "policy." The court looked only at the name the pronouncement bears, not at what it purports to do. In so narrowing its field of vision, TECA disregarded the holdings of this Court. "An executive agency must be rigorously held to the standards by which it professes its action to be judged." *Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959) (Frankfurter, J., concurring and dissenting).

CONCLUSION

The Department of Energy's so-called "Statement of Policy" bears all the markings of a substantive rule. In effect, DOE has adopted and promulgated a statute of limitations, representing to those it regulates, to the public, and to Congress that it has made certain the limits of audit liability for petroleum marketers. TECA's conclusion to the contrary conflicts with the express intent of the "policy" and the decisions of this Court. To allow that conclusion to stand would be to allow the Department to substitute at its whim "the protracted fear of litigation" for the "certainty" it has publicly espoused. This Court should not allow the Department to so offend

basic principles of fair play and due process. The Court should issue the writ.

Respectfully submitted,

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APPENDIX

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 9-51

UNITED STATES OF AMERICA AND GEORGE W. HUBBARD, AUDIT DIRECTOR, AND ECONOMIC REGULATORY ADMINISTRATION, DEPARTMENT OF ENERGY,
Petitioners-Appellees,

v.

PASCO PETROLEUM CO., INC.,
Respondent-Appellant.

Appeal from the United States District Court
for the District of Arizona

(No. Civ. 79-893 PHX-CAM)

(Argued: September 19, 1980 Decided: October 16, 1980)

JAMES P. TIERNEY, Lathrop, Koontz, Righter, Clagett, Parker & Norquist, Kansas City, Missouri, with whom Alfred R. Hupp, Jr., of the same firm; and Loren W. Counce, Jr., Snell & Wilmer, Phoenix, Arizona, were on the brief for the Respondent-Appellant.

PAUL A. KATZ, United States Attorney's Office, District of Arizona, with whom Michael D. Hawkins, U.S. Attorney and John D. Lyons, Jr., Assistant U.S. Attorney; and Terry L. Anderson, Assistant Regional Counsel, U.S. Department of Energy, Los Angeles, California, were on the brief for the Petitioners-Appellees.

Before INGRAHAM, ESTES, and LACEY, Judges.

ESTES, Judge:

Respondent-Appellant, Pasco Petroleum Co., Inc. (Pasco), an Arizona corporation, is engaged in the marketing of gasoline and under the Department of Energy (DOE) regulations is a reseller-retailer as that term is defined in 10 CFR § 212.31. On June 29, 1978, Pasco received a Data Statement Letter (DATS Letter) from George W. Hubbard, Area Manager, Enforcement Division of Region IX of the ERA of the DOE, advising the firm that it had been selected for investigation of its compliance with DOE pricing regulations for the sale of petroleum products during the period November 1, 1973-April 30, 1974. The letter requested Pasco to make available to DOE all data showing the firm's manner of computing its maximum lawful selling prices for its sales of petroleum products during this period, including information on the firm's May 15, 1973 selling prices and increased product costs.

Pasco agreed to an August 22, 1978 meeting with a DOE auditor for the examination of the records. Pasco's counsel,* however, began to question the legality of the examination under a DOE audit policy statement published on June 23, 1978, and so informed the auditor and his superiors prior to the August meeting date.

Pursuant to the DATS Letter and arrangements previously made with Pasco's comptroller, a DOE auditor appeared at Pasco's office in Phoenix on August 22, 1978, and asked to inspect Pasco's records. After Pasco's refusal to produce any records except those pertaining to

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*Pasco's counsel, James P. Tierney, certifies he is vice-president, secretary and director of Pasco, and also "officer, director" and shareholder (one of only three) of Pasco Industries Inc., parent corporation of respondent, Pasco Petroleum Co., Inc.

its May 15, 1973 selling prices, Hubbard issued a subpoena to Pasco requiring the company's custodian of records to appear before DOE's Los Angeles office on September 7, 1978, for the examination of documents and materials "relating to all purchases, sales, storage, transportation, and exchanges of covered petroleum products by Pasco Petroleum Co., Inc. in its capacity as a reseller-retailer" for the period April 1, 1973-June 30, 1978. The request for documents included, but was not limited to, all sales and purchase invoices, schedules of all customers, a listing of all credit terms maintained by customers, corporate minutes for all special and regular shareholders' meetings, correspondence files, and copies of all documents relating to the purchase and sale of stock of Pasco Petroleum Co., Inc., and related entities. The subpoena was served on Pasco on August 23, 1978.

Pasco pursued administrative remedies available under 10 CFR Part 205 but was unsuccessful in its efforts to quash the subpoena.[1] The Office of Hearings and Appeals' denial of Pasco's application to quash on January 17, 1979, constituted final agency action in this matter.

In light of Pasco's continued refusal to produce the requested documents, the DOE filed a petition for enforcement of the subpoena in the United States District Court for the District of Arizona on December 5, 1979. Having heard oral argument on February 4, 1980, the District Court issued an order on May 20, 1980, requiring Pasco's compliance with the subpoena. Pasco now appeals to this court, challenging the issuance of the subpoena on the basis of a DOE policy limiting audits of resellers.

---

1. The District Director of Enforcement, Region IX (by Decision & Order issued December 18, 1978, modified the terms of the subpoena to extend the time period over which the documents could be produced and to allow production of the documents at Pasco's place of business in Phoenix, rather than at the DOE's Los Angeles office.

The DOE "Statement of Policy Regarding Audits Begun After June 30, 1978 to Determine Compliance with the Mandatory Petroleum Price Regulations"[2] (hereafter referred to as reseller audit policy) limits audits and civil liability of certain resellers by providing that:

> A. It is the policy of the Economic Regulatory Administration (ERA) not to commence any price regulation audits after June 30, 1978, at: (1) Any resellers, reseller-retailers or retailers (as defined in 10 CFR 212.31) of petroleum products other than propane, or (2) small resellers, small reseller-retailers or small retailers of propane, except on suspicion of a willful violation of the price regulations, by reason of complaints or other credible indications of significant violations, or if an exception or other special relief from the price regulations has been afforded. Resellers, reseller-retailers or retailers (as defined in 10 CFR 212.31) of propane are considered to be small if they had less than $2 million in sales of propane during calendar year 1977.
>
> B. It is the policy of the ERA not to seek, as a result of price regulation audits commencing after June 30, 1978, to impose civil liability on: (1) Any firm described in paragraph A for transactions that occurred more than two years prior to commencement of the audit; or (2) Any other firm, except crude oil producers, crude oil resellers, and refiners in their crude oil production, sale and resale activities, for transactions that occurred more than five years prior to commencement of the audit, except where a firm has been convicted criminally for transactions covered by price regulations.

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2. 43 Fed. Reg. 27,777 (June 27, 1978); 3 CCH Federal Energy Guidelines ¶ 15,400A.

Relying on the reseller audit policy, Pasco makes several arguments:

1. The DATS Letter Pasco received on June 29, 1978, was not the commencement of the audit and, therefore, the audit is barred by the new policy.

2. If the DATS Letter did begin the audit, then the policy precludes the expansion of the audit to all but the two most recent years preceding the audit.

3. The agency lacked "complaints or other credible indications of significant violations" under the "special circumstances exception" of the reseller audit policy. For this third argument, Pasco draws support from DOE's inability to produce any information regarding the identity of the alleged complainant or the complaint itself, a DOE auditor's previous approval of the firm's non product cost passthroughs,[3] and statements both in written memoranda[4] and at the District Court hearing that the agency was auditing Pasco because it was necessary to "have an enforcement presence in the Phoenix area."[5]

DOE argues that:

1. The subpoena was issued for a lawful purpose and seeks documents relevant to that purpose.

2. The new reseller audit policy does not limit DOE's right to subpoena Pasco's records. The audit began with the issuance of the DATS letter before the effective date of the new policy; and, in any event, the audit can be

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3. Pasco Brief, Appendix B.

4. Attachment to Memorandum of May 19, 1978, from Jack Wood, Director of Enforcement, Region IX, ERA, to Bart Isenberg, Director, Audit and Enforcement, ERA, Exhibit E-2 to DOE's Petition for Enforcement in the District Court.

5. Transcript 10-11.

justified under the "special circumstances exception" of the policy.

Although there has been some confusion within DOE itself as to the exact status of the new reseller audit policy,[6] that policy is simply a policy, not a regulation or rule. The record in this case reflects that DOE had commenced the Pasco audit prior to the effective date of the DOE reseller audit policy, July 1, 1978;[7] hence such policy is no bar to enforcement of the subpoena. Congress conferred broad subpoena authority on DOE by § 5(a)(1) of the Emergency Petroleum Allocation Act, as amended, 15 U.S.C. § 751 et seq., incorporating § 206 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904

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6. See: DOE Memo of June 27, 1978, re: "Reseller-Other Audits," Exhibit E-3 to DOE's Petition for Enforcement; the Decision and Order of January 17, 1979, of the Office of Hearings and Appeals (OHA), denying relief to Pasco:

> We agree with Pasco that if it could be shown that the Regional Office issued this subpoena in contravention of the new audit policy established by the national office, it would raise a serious question as to the propriety of the subpoena's issuance. . . . [T]his audit appears to be consistent with the policy of limiting audits to cases where there are 'credible indications of significant violations.'

and the Decision & Order of July 10, 1979, in *Glenn Martin Heller*, where OHA determined that

> the Statement of Policy does not in our view bar enforcement actions against individual members of the specified class. . . . A general statement of policy does not impose any rights or obligations on a regulated firm . . .

7. In particular, see the matters referred to in the Brief of Appellee, pp. 9-13, including, but not limited to, the memorandum of June 27, 1978, from Barry E. Wagman, Director of the National Office of Enforcement Policy and Planning, to Jack L. Wood, instructing Wood to start the audit of Pasco by issuing the DATS letter (p. A-10 of Appellee's Brief); the DATS letter of June 27, 1978; 10 CFR § 210.92(d); 10 CFR § 210.92(d)(2)(A) and especially the preamble thereof regarding the DOE definitive list of all open audits as of June 30, 1978, 43 F.R. 27779; the appearance of Pasco's name on the DOE's definitive list of open audits as of June 30, 1978 (p. A-14, Appellee's Brief). And see key opinion in *United States v. Bell*, 564 F.2d 953 (TECA 1977), and authorities cited therein.

note; § 13(b), (e)(1) of the Federal Energy Administration Act of 1974, 15 U.S.C. § 762 et seq.; and § 645 of the Department of Energy Organization Act, 42 U.S.C. § 7101 et seq., which grants to the Secretary of Energy and his duly authorized agents the same powers and authority granted the Federal Trade Commission under the FTC Act, 15 U.S.C. § 49, which authorizes the Commission "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." The regulations promulgated pursuant to these statutes, 10 CFR §§ 205.201(a), 205.8, in no way restrict the subpoena authority of the DOE.

The limited role of the reviewing court in a subpoena enforcement proceeding has been thoroughly explored by this Court in *United States v. Empire Gas Corp.*, 547 F.2d 1147 (TECA 1976), *cert. den.* 430 U.S. 915, *United States v. Bell*, 564 F.2d 953 (TECA 1977), *United States v. First City National Bank*, 598 F.2d 594 (TECA 1979), and *United States v. Southwest National Bank*, 598 F.2d 600 (TECA 1979). The only issues properly before a court in any subpoena enforcement proceedings are "whether the subpoena was issued for a lawfully authorized purpose and whether it seeks information relevant to the agency's inquiry." *United States v. Southwest National Bank*, supra at 602.

The DOE is charged by Congress with determining compliance with and enforcing the Mandatory Allocation and Price Regulations. The subpoena to Pasco was issued in aid of a DOE investigation to determine Pasco's compliance with the reseller pricing regulations, clearly a lawfully authorized purpose. Unquestionably the subpoena seeks information relevant to the agency investigation. *United States v. Southwest National Bank*, supra.

Pasco has, however, argued that DOE is attempting through this procedure to apply retroactively Ruling 1975-14 regarding non-product cost justification, despite DOE's approval of Pasco's selling prices and margins in a prior audit.[8] A later regulation, 10 CFR § 212, imposes on resellers the obligation of justifying their non-product cost pass-throughs. Although by statutory amendment of the FEA Act, known as the Findley amendment, DOE is precluded from enforcing this regulation retroactively, Pasco maintains that its non-product cost pass-throughs form the basis of DOE's assertion that Pasco's overcharges may exceed $1 million. This matter is one which Pasco would be entitled to present in defense against an administrative complaint or in a collateral action, but it is not a proper defense to the enforcement of the subpoena. *United States v. Southwest National Bank,* supra, *United States v. Empire Gas Corp.,* supra at 1152 n. 3, and *United States v. Bell,* supra.

Pasco's challenge of the DOE subpoena is without merit; and Pasco's argument that the Doe reseller audit policy bars enforcement of the subpoena is also without merit. The order of the District Court appealed from is AFFIRMED. Pasco must comply with such subpoena forthwith. IT IS SO ORDERED.

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8. Pasco was audited for the period January 1, 1974-July 31, 1974. The agency approved Pasco's wholesale and retail margins and found the firm's retail outlets to be slightly underpriced as a result of competition in the area. See note 3, supra.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. CIV 79-983 PHX CAM

UNITED STATES OF AMERICA and GEORGE W. HUBBARD, Audit Director ECONOMIC REGULATORY ADMINISTRATION DEPARTMENT OF ENERGY,
Petitioners,

vs.

PASCO PETROLEUM CO., INC.,
Respondent.

ORDER

(Filed May 20, 1980)

The Court, having received and considered the pleadings of the parties, including the Government's response to Pasco's hearing brief, and having heard the oral arguments of the parties, finds and concludes that the Government's position is well taken.

Therefore,

IT IS ORDERED that respondent shall make its books and records available to the United States of America for inspection and audit for the period set forth in the subpoenas in issue in this matter.

IT IS FURTHER ORDERED that the Government shall pay respondent's reasonable expenses of complying with said subpoenas.

IT IS FURTHER ORDERED that respondent shall pay petitioners' expenses in bringing this action.

DATED this 20th day of May, 1980.

/s/ C. A. Muecke
C. A. Muecke, Chief Judge

APPENDIX C

Department of Energy
Washington, D.C. 20461

JAN 17 1979

DECISION AND ORDER OF THE
DEPARTMENT OF ENERGY
Petition for Special Redress
Application for Stay

Name of Petitioner:	Pasco Petroleum Company, Inc.
Date of Filing:	January 2, 1979
Case Numbers:	DSG-0040
	DES-0140

On January 2, 1979, Pasco Petroleum Company, Inc. (Pasco) filed a petition for Special Redress with the Office of Hearings and Appeals of the Department of Energy. The Petition, if granted, would result in the issuance of an Order by the DOE quashing a subpoena which the Los Angeles Area Manager of DOE Region IX issued to Pasco on August 22, 1978. At the time it filed its Petition for Special Redress, Pasco also filed an Application for Stay of the provisions of the subpoena pending a final determination of its Petition.

Pasco is a reseller/retailer of covered petroleum products as that term is defined in 10 CFR 212.31 and is therefore subject to the DOE price and allocation regulations. The record in this matter indicates that in May 1978 the DOE began an investigation of Pasco's compliance with various provisions of the DOE Regulations. On June 27, 1978, the DOE requested, among other documents, records of the firm's sales transactions during the period November 1, 1973 through April 30, 1974 (the embargo period) and records documenting amounts of increased transportation

costs. After representatives of Pasco refused the DOE access to the requested documents, Region IX issued a subpoena *duces tecum* to Pasco on August 22, 1978.

On August 31, 1978, Pasco filed an Application to Quash or Modify Subpoena pursuant to the provisions of 10 CFR 205.8(h)(1). In a Decision issued on November 15, 1978, the Area Manager for the Los Angeles Area Office of DOE Region IX denied Pasco's Application to Quash. On November 28, 1978, Pasco submitted an Application for Review of Denial of Application to Quash or Modify Subpoena to the District Manager for the Western District of Enforcement in accordance with the provisions of 10 CFR 205.8(h)(2). The District Manager, in a Decision which he issued to the firm on December 18, 1978, refused to quash the subpoena but modified the subpoena to permit production of the documents at the firm's offices rather than at DOE offices. On January 2, 1979, Pasco filed the present Petition for Special Redress and Application for Stay with the Office of Hearings and Appeals of the Department of Energy pursuant to 10 CFR 205.8(h)(4).

Section 205.8(h)(4) of the DOE Regulations provides:

> Any person to whom a subpoena is directed, in the event that an application to quash or modify such subpoena is in any part denied by a Regional Administrator or other reviewing official, may, within ten (10) days after the date of service of such denial, seek relief from the [Office of Hearings and Appeals] at the address provided in Section 205.12, only upon a showing that an immediate review is warranted to correct substantial errors of law, or to prevent substantial injury to legal rights, or to cure a gross abuse of administrative discretion. The relief requested may include a request for a stay of the obligation to com-

> ply with the subpoena, for good cause shown, pending a determination by the [Office of Hearings and Appeals].

As indicated in the Preamble to Section 205.8(h) of the DOE Regulations, the Office of Hearings and Appeals first reviews a petition seeking to quash a subpoena to determine if there is a reasonable probability that the petitioner will be able to satisfy the criteria specified in Section 205.8(h)(4). If the DOE determines that a petition might satisfy the applicable criteria for extraordinary relief, the Office of Hearings and Appeals will then fully consider the petition on its merits; on the other hand, if the Office of Hearings and Appeals determines that the petition fails to make this threshold showing, the petition will be dismissed. 41 Fed. Reg. 55322 (1976). *See Knowles Oil Co.*, 1 DOE Par. 82,556 (1978); *Clark Oil & Refining Co.*, 1 DOE Par. 82,507 (1977).

The scope of review of subpoenas by the Office of Hearings and Appeals is more limited that that which governs an appeal filed pursuant to 10 CFR, Part 205, Subpart H, because of the nature of the subpoena as an enforcement mechanism and the procedures established for the reexamination of the legal sufficiency of subpoenas at two prior levels of review. *See* Sections 205.8(h)(1) and (2). As the Preamble to Section 205.8(h) indicated:

> Any additional review should only exist to check gross errors in judgment made at those two levels. The intent of FEA in establishing such a review procedure is to ensure that there is a means within the agency to redress such gross errors in judgment, not to provide another level of review. For this reason, FEA has concluded that an initial determination should be made by the [Office of Hearings and Appeals] to exclude any applications which upon initial review do not show

a reasonable probability of satisfying the prerequisites warranting extraordinary relief.

41 Fed. Reg. 55323 (December 20, 1976).

After reviewing Pasco's Petition for Special Redress and the entire administrative record in this proceeding, we have concluded that Pasco has failed to demonstrate a reasonable probability that it can show circumstances "so exceptional that an immediate review is warranted to correct substantial errors of law, or to prevent substantial injury of legal rights, or to cure a gross abuse of administrative discretion." The arguments advanced by Pasco in its present Petition were considered on two occasions at the Regional Level and resulted in modification of the original subpoena. The record before us presents no evidence of an error of law or abuse of discretion by Region IX in issuing the November 15, 1978 and December 18, 1978 Decisions. The following brief review of Pasco's arguments in support of its Petition for Special Redress indicates that the firm's contentions are without merit.

Pasco objects to the subpoena on the grounds that the Regional Office's issuance of the subpoena was contrary to a major audit policy previously announced by the DOE. The firm contends that the Regional Office is precluded from initiating an audit by the following terms of the DOE national policy statement:

STATEMENT OF POLICY REGARDING AUDITS BEGUN AFTER JUNE 30, 1978, TO DETERMINE COMPLIANCE WITH THE MANDATORY PETROLEUM PRICE REGULATIONS

A. It is the policy of the Economic Regulatory Administration (ERA) not to commence any price regulation audits after June 30, 1978, at: (1) Any reseller-retailers or retailers (as defined in 10 CFR

> 212.31) of petroleum products other than propane, or (2) small resellers, small reseller-retailers or small retailers of propane, except on suspicion of a willful violation of the price regulations, by reason of complaints or other credible indications of significant violations, or if an exception or other special relief from the price regulations has been afforded.

43 Fed. Reg. 27777 (June 27, 1978).

We agree with Pasco that if it could be shown that the Regional Office issued this subpoena in contravention of the new audit policy established by the national office, it would raise a serious question as to the propriety of the subpoena's issuance. However, we need not resolve this issue since the record in this proceeding shows that the preliminary investigation of Pasco's compliance with DOE regulations has indicated the possibility of substantial overcharges. Therefore, this audit appears to be consistent with the policy of limiting audits to cases where there are "credible indications of significant violations." Consequently, we have concluded that Pasco's contention that DOE policy forbids the issuance of a subpoena in this matter is without merit.

Pasco also contends that 10 CFR section 210.92 and the Data Statement letter that initiated this audit are both invalid because the DOE has failed to comply with the Federal Reports Act, 44 U.S.C. section 3512. The DOE has previously considered and rejected this identical argument. *See Romaco, Inc.*, 1 DOE Par. 82,563 (1978) *and Leonard E. Belcher*, 1 DOE Par. 80,183 (1978). Since Pasco has not demonstrated that it was erroneous for Region IX to follow those precedents, we have concluded that this contention is also without merit.

Pasco further contends that the terms of the subpoena are unreasonable, oppressive, unduly burdensome

and overbroad. These contentions were fully considered and found to be without merit in the November 15 and December 18 Decisions which were issued in connection with the review of the August 22 subpoena. The subpoena has been modified in the District Manager's December 18 Decision to allow Pasco to make the requested documents available to DOE auditors in Pasco's offices in Phoenix, Arizona, rather than in the DOE Regional Office in Los Angeles. The reviewing DOE officials further noted that Pasco's contention that the subpoena is overly burdensome is without merit since the documents requested by the subpoena primarily consist of the type of records that regulated firms like Pasco are required to keep and make available to the DOE upon request. *See* 10 CFR 210.92. Pasco has not presented convincing evidence that the Regional Office erred in concluding that the subpoena is not unreasonable, oppressive, unduly burdensome or overbroad. Although the subpoena's terms are broad, it appears that the documents are all relevant to the ongoing lawful investigation of Pasco's compliance with the DOE price regulations. The courts have consistently upheld broad administrative subpoenas where the documents appeared to be relevant to a proper investigative purpose. *U.S. v. Bell,* 563 F.2d 953 (TECA 1977); *U.S. v. Empire,* 547 F.2d 1147 (TECA 1976); *FTC v. Texaco,* 555 F.2d 862 (C.A.D.C. 1977), *cert. denied,* 97 S.Ct. 2939, 2940; *Genuine Parts v. FTC,* 445 F.2d 1382 (C.A.D.C. 1971).

Based on the considerations set forth above, the Department of Energy has concluded that Pasco Petroleum Company, Inc. has failed to establish that the circumstances surrounding the issuance of a subpoena to the firm by DOE Region IX on August 22, 1978, are so exceptional that further review is warranted at this time. The firm's

Petition for Special Redress seeking review of the issuance of the subpoena will therefore be dismissed, and its Application for Stay will be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Petition for Special Redress filed by Pasco Petroleum Company, Inc. be and hereby is dismissed.

(2) The Application for Stay filed by Pasco Petroleum Company, Inc. be and hereby is denied.

/s/ Melvin Goldstein
Melvin Goldstein
Director
Office of Hearings and Appeals

Dated: JAN 17 1979

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 9-51

UNITED STATES OF AMERICA, *et al.*,
Petitioners-Appellees,

v.

PASCO PETROLEUM CO., INC.,
Respondent-Appellant.

BEFORE HONORABLE JOE McDONALD INGRAHAM, HONORABLE JOE EWING ESTES, and HONORABLE FREDERICK B. LACEY, JUDGES.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Arizona and was argued by counsel.

In consideration whereof, it is ORDERED that the judgment of said court is AFFIRMED.

For the Court:

/s/ Richard D. Dumont
Richard D. Dumont
Deputy Clerk

October 16, 1980

District Court No. Civ. 79-893 PHX-CAM

APPENDIX E

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 9-51

UNITED STATES OF AMERICA AND GEORGE W. HUBBARD, AUDIT DIRECTOR, ECONOMIC REGULATORY ADMINISTRATION, DEPARTMENT OF ENERGY,
Petitioners-Appellees,

v.

PASCO PETROLEUM CO., INC.,
Respondent-Appellant.

Before HONORABLE JOE McDONALD INGRAHAM, HONORABLE JOE EWING ESTES, and HONORABLE FREDERICK B. LACEY, Judges.

Upon consideration of Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*,

IT IS ORDERED that said Petition for Rehearing and Suggestion for Rehearing *En Banc* are DENIED. The mandate will issue on November 24, 1980.

For the Court:

Ruth H. Jacobson
Clerk
by: /s/ Michael S. Levine
Michael S. Levine
Deputy Clerk

November 17, 1980

APPENDIX F

UNITED STATES
DEPARTMENT OF ENERGY

3660 WILSHIRE BOULEVARD, SUITE 800
LOS ANGELES, CA 90010

SUBPOENA

In a matter before the Department of Energy Concerning
Pasco Petroleum Company, Inc.

TO: Custodian of Records, Pasco Petroleum Company, Inc.

AT: 4804 North 22nd Street, Suite 101, Phoenix, AZ 85016

YOU ARE HEREBY REQUIRED to appear before Thomas H. Binns and Clark Vaughn, officers of the Department of Energy, at 3660 Wilshire Blvd. Suite 800, Los Angeles, CA 90010 on the 7 day of September, 1978 at 9:00 A.M. to bring with you and produce for examination the documents and materials specified in the attached schedule.*

FAILURE TO OBEY THIS SUBPOENA WILL RESULT IN REFERRAL TO A UNITED STATES DISTRICT COURT FOR ENFORCEMENT.

You may appeal this subpoena pursuant to 10 CFR § 205.8.

Issued this 22nd day of August, 1978 under the authority of § 206 of the Economic Stablization Act of 1970,

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*Actual receipt by George W. Hubbard or his designate Thomas H. Binns, of true copies of the document described in the attached schedule on or before September 9, 1978 will be deemed sufficient compliance and will excuse further compliance under this subpoena.

as amended, incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973; as amended; § 13 of the Federal Energy Administration Act of 1974; §§ 645 and 705 of the Department of Energy Organization Act and 10 CFR § 205.8 and § 205.201.

Signature /s/ George W. Hubbard
George W. Hubbard

Title Area Manager

CERTIFICATE OF SERVICE

I certify that I served an attested copy of this subpoena on Wednesday at 10:10 AM, August, 23 1978 by Personal Service.

Signature /s/ Thomas H. Binns
Thomas H. Binns

Title Auditor

SUBPOENA ATTACHMENT

Description of Documents Requested:

All books, correspondence, records, memoranda and other files for the period April 1, 1973 through June 30, 1978 relating to all purchases, sales, storage, transportation and exchanges of covered petroleum products by Pasco Petroleum Company, Incorporated in its capacity as a reseller-retailer.

The documents referred to above include, but are not limited to the following:

1. All sales and purchase invoices.
2. All bills of lading, delivery tickets, and any other kind of shipping documents.
3. All purchase and sales contracts.
4. All exchange agreements and exchange journals.
5. All saybolt and other inspection and analysis reports.
6. Cash disbursement journals.
7. Cash receipts journals.
8. Check register.
9. Accounts payable ledgers.
10. Accounts receivable ledgers.
11. Schedule of all customers.
12. Storage and inventory records.
13. Price schedules for each price charge and description of price policies.
14. Listing of all credit terms maintained by customer.

15. Financial statements by month and year for each entity constituting the "firm" Pasco Petroleum Co., Inc.

16. Corporate minutes for all special and regular meetings of the shareholders.

17. Correspondence files.

18. Schedules of commissions.

19. May 15, 1973 weighted average unit cost calculations.

20. Description of each class of purchaser and 5/15/73 weighted average selling prices for each class of purchaser concerned.

21. Processing agreements.

22. Copies of all documents relating to the purchase and sale of stock of Pasco Petroleum Co., Inc., and related entities.

As used hereinabove, the term "documents" means all writings, audio recordings, discs and other devices used for storing data in a computer facility, and all other kinds of records, including, but not limited to: the original or identical copy thereof and all nonidentical copies (whether different from originals by reason of notation made on such copies or otherwise); all letters, telegrams, memoranda, reports, studies, workpapers, calendar or diary entries, telephone messages and log books, and notes, minutes and records of conversations, discussions, meetings and conferences; and all drafts and preliminary drafts of the foregoing.

APPENDIX G

UNITED STATES
DEPARTMENT OF ENERGY

3660 WILSHIRE BOULEVARD, SUITE 800
LOS ANGELES, CA 90010

June 27, 1978

Pasco Petroleum Company
4808 N. 22nd Street
Suite 102
Phoenix, Az 85016

Dear Sirs:

This is to advise you that the firm of Pasco Petroleum has been selected for investigation by the Department of Energy (DOE). The objective of the investigation will be to determine Pasco Petroleum's compliance with DOE price regulations relating to the sale of petroleum products during the period November 1, 1973 through April 30, 1974.

As you are already aware, DOE price regulations (10 CFR § 212.93(a)) applicable to resellers are premised on the ascertainment of maximum lawful prices based on May 15, 1973 sales prices plus an amount which reflects on a dollar-for-dollar basis, the increased costs of the item. In addition, DOE regulations (10 CFR § 212.93(b)) allow certain non-product costs incurred to be reflected in the computation of lawful prices.

Pasco Petroleum is hereby requested to make available to DOE data which will show the manner in which the company computed its maximum lawful prices for sales of petroleum products for the period from November 1, 1973 through April 30, 1974, including information on its May

15, 1973 prices for such products and data concerning increased product cost.

Presentation of the required data in the format outlined below will facilitate the rapid completion of the audit:

1. A list showing each class of purchaser (as defined in 10 CFR § 212.31 and elucidated in Ruling 1975-2) applicable to sales of each product by the firm and the name of each purchaser in each class. Section 212.31 defines class of purchaser as—"Purchasers or lessees to whom a person has charged a comparable price for a comparable property or service pursuant to customary price differential between those purchasers or lessees and other purchasers or lessees." Identify any new customers acquired during the audit period.

2. The number of gallons and single firm-wide weighted average cost of each product in physical inventory as used to calculate increased product costs during the period November 1, 1973 through April 30, 1974. Specifically, a weighted average inventory cost should be provided to substantiate that each price increase was based on increased product costs, pursuant to 10 CFR § 212.93.

3. If the weighted average inventory cost for a product cannot be determined, provide the total gallons of product acquired for resale and the related acquisition cost, exclusive of transportation in each month, November 1, 1973 through April 30, 1974.

4. If price increases were based on increases in costs of transporting products, identify increases in transportation costs associated with those quantities of each product transported from refinery/supply terminals into inventory during the period November

1, 1973 through April 30, 1974, along with documentation showing that such increases were actually incurred. Amounts of increased transportation costs incurred in connection with transporting products from refinery/supply terminals or from the company's terminals or storage facilities to purchasers are to be stated separately.

5. The number of gallons, per gallon selling price, and total revenue derived from sales to each petroleum product to each purchaser during the period November 1, 1973 through April 30, 1974. The number of gallons and sales revenues for each product may be stated *in total* for the class of purchaser concerned, provided the company can demonstrate that every purchaser in the class received the same selling price during each pricing period.

Additionally, DOE may after its initial review, need to examine similar data for later periods.

A representative from this office is scheduled to visit you at a future mutually arranged time. DOE is requesting that the information set forth above together with supportive records (i.e., purchaser invoices, payment receipts, sales invoices, etc.) be readily available for examination by its representative. We consider this to be the minimum information necessary for DOE to determine if Pasco Petroleum's sales prices for petroleum products are lawful and expect it to be readily available since the firm should have been making such calculations to determine its maximum lawful prices and keeping such records in accord with 10 CFR § 210.92.

Failure to provide the records and documents requested may be deemed a violation of 10 CFR § 210.92.

After the auditor's work has been reviewed at the appropriate supervisory levels, you will be informed of the results of the audit.

If we can be of help in providing technical assistance or additional information regarding this request, please phone Mr. Thomas Binns at (213) 688-3088.

Sincerely,

/s/ George W. Hubbard
George W. Hubbard
Area Manager
Enforcement Division
Economic Regulatory Administration

No. 80-1022

In the Supreme Court of the United States

OCTOBER TERM, 1980

PASCO PETROLEUM CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1022

PASCO PETROLEUM CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner is a reseller and retailer of certain refined petroleum products. At all times relevant to this litigation, petitioner's sales of these products were subject to price controls under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751-760h.[1] See 10 C.F.R. Parts 210 and 212. In May 1978, the Department of Energy (DOE) began an investigation of petitioner's compliance with the price control regulations. On June 27, 1978, DOE issued a data statement ("DATS") letter requesting that petitioner make

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[1]By the terms of the Act, these controls expire on September 30, 1981. See 15 U.S.C. 760g. On January 28, 1981, the President directed that "[a]ll crude oil and refined petroleum products are exempted from the price and allocation controls adopted purusant to the Emergency Petroleum Allocation Act" and that "[t]he Secretary of Energy shall promptly take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order." Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981).

available for inspection certain records pertinent to the investigation. Petitioner received the letter on June 29, 1978. After petitioner declined to comply with the DATS request, DOE issued an administrative subpoena. Thereafter, petitioner unsuccessfully pursued its remedies within the agency (Pet. App. A2-A3, A11-A12).

When petitioner adhered to its refusal to produce the requested documents, the government commenced this action to enforce the subpoena in the United States District Court for the District of Arizona (Pet. App. A3, A12). The district court granted enforcement and ordered petitioner to comply with the subpoena (*id.* at A9-A10). On petitioner's appeal, the Temporary Emergency Court of Appeals (TECA) affirmed the judgment of the district court (*id.* at A1-A8, A18).

2. Petitioner does not challenge TECA's conclusions that "[t]he subpoena * * * was issued in aid of a DOE investigation to determine [petitioner's] compliance with the reseller pricing regulations, [which is] clearly a lawfully authorized purpose," and that "the subpoena seeks information relevant to the agency investigation" (Pet. App. A7). Rather, it contends that the subpoena was issued in violation of DOE's "Statement of Policy Regarding Audits Begun After June 30, 1978" (43 Fed. Reg. 27782 (1978); Pet. 2-3) and is therefore unenforceable. This contention is without merit, and further review is unwarranted.

On its face, the DOE statement of policy is expressly limited to "audits begun after June 30, 1978" (43 Fed. Reg. 27782 (1978); Pet. 2). Here, the DATS letter was sent to petitioner on June 27, 1978, and was received by petitioner on June 29, 1978. Thus, as TECA found (Pet. App. A6), "[t]he record in this case reflects that DOE had commenced the * * * audit [of petitioner] prior to the effective date of the DOE reseller audit policy, July 1, 1978." See also 43 Fed. Reg. 27781 (1978), 10 C.F.R. 210.92(d)(2)(i) ("[a]n

audit of a firm * * * shall be deemed to have begun with the mailing of a data statement (DATS) letter"). Accordingly, since the audit of petitioner was begun prior to July 1, 1978, DOE's statement of policy "is no bar to enforcement of the subpoena" (Pet. App. A6).

While not contesting TECA's determination that the DATS letter served to initiate DOE's audit, petitioner argues (Pet. 7-8) that the subpoena is subject to the statement of policy insofar as it covers documents relating to time periods that were not mentioned in the DATS letter. Contrary to the premise of this argument, however, a DATS letter does not define the final scope of the information to be reviewed; rather, it serves to commence the audit of a firm by requesting voluntary production of designated materials. For this reason, as the DATS letter explicitly states (Pet. App. A26), "DOE may after its initial review, need to examine similar data for later periods."

Petitioner also broadly asserts (Pet. 8-15) that DOE is bound by its statement of policy and that any agency actions inconsistent with this statement are null and void. The statement of policy rests upon the Department's "responsibility to allocate its own resources to those audit areas having the greatest enforcement potential" (43 Fed. Reg. 27779 (1978)) and its view of the "appropriate[ness,] as a matter of prosecutorial discretion, to impose upon itself such a limitation * * * " (*id.* at 27780). Whatever the merits of petitioner's assertion in these circumstances, the question it seeks to raise is not presented in this case because, as TECA held, the subpoena to petitioner is outside the terms of DOE's statement of policy. Moreover, even if the statement of policy were applicable, the DOE Office of Hearings and Appeals correctly determined that the subpoena here falls within the specific provision allowing an audit to be commenced after June 30, 1978, "where there are 'credible

indications of significant violations' " (Pet. App. A15).[2] Thus, there is no occasion for the Court to address petitioner's contention in this case.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[2]TECA found it unnecessary to pass upon this issue in view of its determination that the statement of policy did not preclude issuance of the subpoena in the first instance. Furthermore, and notwithstanding petitioner's suggestion to the contrary (Pet. 13-14, n.1), an agency's interpretation of its own rules and policies is entitled to considerable deference by the courts. See, *e.g.*, *Ford Motor Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). Such deference is particularly appropriate where, as in this case, the agency is merely engaged in a preliminary investigation "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if * * * the facts thus discovered should justify doing so." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 201 (1946).

[3]We also wish to inform the Court that TECA issued its mandate on November 24, 1980, thereby allowing the audit to proceed after being delayed for two years. Thereafter, petitioner applied to TECA for a stay. Treating this application as a motion to recall the mandate, TECA denied petitioner's request on December 12, 1980. We are advised that DOE's inspection of petitioner's records commenced on January 12, 1981, and that the audit is expected to be completed in the next several months.